IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-101

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, and PHILIP L. TOIA,

Petitioners,

against

JOANNE SWIFT, Individually and on behalf of her minor daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Respondents,

LYLIA ROE, Individually and on behalf of her minor children, CAROL ROE and CHERYL ROE,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS IN REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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POINT I

The issue raised by this case is whether the requirements of *Van Lare* v. *Hurley*, 421 U.S. 338 (1975), concern the application of income which is in fact available; not whether support payments are to be considered available.

The United States' Amicus Brief makes clear that 45 CFR 233.90(a) was established to implement the requirements set forth by this Court in *Van Lare* v. *Hurley*, 421

U.S. 338 (1975), and that petitioners' policy would conflict with 45 CFR 233.90(a) only insofar as it violated those requirements. (Amicus Br. p. 7) The United States asserts that petitioners' policy is invalid under *Van Lare* ". . . in that the State improperly presumed that resources available to a non-eligible household member are also available to eligible members of the AFDC unit". (Amicus Br. p. 7) This is a mischaracterization of the issue involved in this action.

The issue herein is not whether the support income of respondents' non-recipient children was presumed "available" to reduce respondents' per capita needs. Support payments, by their very nature, are in fact available for the specific purpose of providing for the per capita basic needs of their intended beneficiary. As the District Court acknowledged, if respondents apply the support payments to that mandated purpose, their per capita needs are reduced through operation of the economies of scale. (District Court opinion granting respondents' motion for partial summary judgment, Petition, p. 12a)

Thus, the issue herein is whether *Van Lare* requires that petitioners give respondents the option of *not applying* income which is *in fact available* to reduce their per capita needs. The Court below found that *Van Lare* so requires, and instructed petitioners to disregard the availability of the support payments unless that option was not exercised. (Petition, p. 3a) Petitioners contend that *Van Lare* does not give respondents the option of misapplying the support payments (Petition, pp. 7-9); or, if such option does exist, that petitioners must assume that it was not exercised, absent evidence to the contrary. (Petition, pp. 10-14) No such evidence was presented here.

The misunderstanding of the difference between income availability and application of income which is in fact available is rampant. The confusion of the lower courts on this issue is evident from the directly conflicting decisions

of *Padilla* v. *Wyman,* 34 N.Y. 2d 36, 356 N.Y.S. 2d 3, 312 N.E. 2d 149, *app. dism.* 419 U.S. 1084 (1974) and *Gurley* v. *Wohlgemuth,* 421 F. Supp. 1337 (E.D. Pa. 1976). Compare 34 N.Y. 2d at 40 with 421 F. Supp. at 1347. Clarification of the significance of the *Van Lare* decision is urgently needed.

When the opportunity to misinterpret *Van Lare* is not present the confusion regarding "availability" ceases. The Department of Housing and Urban Development's (H.U.D.) recognition that the mere existence of support payments is sufficient to establish "availability" is reflected by H.U.D.'s inclusion of support payments in the definition of "income" for the purpose of computing public housing rent levels. 24 CFR 860.403(o) (ix). A challenge to this policy insofar as it includes a child's Social Security benefits within the definition of "income" was recently rejected in *Garvey* v. *Worcester Housing Authority,* Civil Action No. 77-979-Mc (D. Mass. 1979) (Unreported Opinion of McNaught, D.J., dated June 29, 1979, reproduced in the Appendix of this brief).

Moreover, H.U.D.'s policy has a direct effect on the AFDC program insofar as many AFDC recipients (undoubtedly including plaintiff class members) reside in public housing. Under the lower courts' decision, petitioners must assume that a non-recipient child's support payments, which the housing authority considers to be available income when the rent level is set, are not available to meet the child's share of the rent. Petitioners are therefore required to provide AFDC funds to cover rent costs directly attributable to the support payments received by the non-recipient.*

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* AFDC rent allowances for recipients living in public housing are determined by the number of rooms in the dwelling unit, 18 N.Y.C.R.R. § 352.3(e). Rent allowances for recipients living in private housing are determined by family size, 18 N.Y.C.R.R. § 352.3(a).

POINT II

Petitioners' policy is the same as when this action was commenced.

The United States contends that petitioners' policy is no longer in effect because it has been supplanted by a new regulation which was enacted "to supersede the proration policy that is challenged in this action"; and that this regulation "apparently requires a more particularized inquiry before assistance payments are reduced due to the presence in the dwelling unit of a non-eligible individual". (Amicus Br. pp. 6-7) The United States is mistaken on both counts.

Petitioners' new regulation (Pet. Reply Br. App. A pp. 2-3) was enacted solely to conform with the two-step budgeting methodology required by State law. (Pet. Reply Br. p. 5) The underlying budgetary policy, *i.e.:* proration of AFDC grants when income is available to meet the per capita shared needs of a non-recipient, has not been changed.

The emphasis placed by the United States on the regulation's "more particularized inquiry" is misplaced. The regulation requires:

> "In determining the cash assistance to be provided, the lower per capita needs resulting from the sharing of expenses by all persons in the dwelling unit shall be considered a resource available to reduce the applicant or recipient's need for public assistance *unless the applicant or recipient demonstrates that this resource is not available.*" (emphasis supplied) (Pet. Reply Br. App. A p. 3)

Thus, the necessary inquiry only concerns whether or not the income and resources of the non-recipient are "available" to reduce the recipients' per capita needs. As

discussed in Point I, *ante,* support payments are *always* so "available". Application of this regulation to respondents' situation would therefore result in a grant of exactly the same size as before. (Pet. Reply Br. pp. 5-6)*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 20, 1979.

Respectfully submitted,

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* At the present time, the injunction of the lower courts prohibits petitioners from applying the new regulation in this manner.

Appendix A, Opinion.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 77-979-Mc

WALTER GARVEY *et al.*

v.

WORCESTER HOUSING AUTHORITY *et al.*

OPINION

June 29, 1979

McNAUGHT, D.J.

This action came on to be heard on motions for summary judgment filed by all of the parties. Upon consideration of the pleadings and the affidavits filed in support of plaintiffs' motions, interrogatories and answers thereto, and after hearing the parties, the court determines and therefore orders that summary judgment should be entered in favor of Patricia Harris, Secretary of the U.S. Department of Housing and Urban Development, and the Worcester Housing Authority. There is no genuine issue as to any material fact.

The plaintiffs herein challenge the right and practice of the defendants Worcester Housing Authority and the U.S. Department of Housing and Urban Development of including children's Social Security benefits in family income for purposes of computing public housing rent levels. Plaintiffs contend that the practice violates the National Housing Act, 42 U.S.C. §§ 1437a(1) (a).

The plaintiff Walter Garvey brought this class action asserting jurisdiction of this court under Title 28, U.S. Code §§ 1343(3), 1337, 1331, 1361 and Title 5, U.S. Code §§ 701-704. The object of the action is declaratory and injunctive relief pursuant to Title 42, U.S. Code § 1983 and Title 28, U.S. Code §§ 2201 and 2202. The jurisdiction of the court is undoubted.

Mr. Garvey resided with his family at 144 Chino Avenue in Worcester in federally funded public housing owned and operated by the Worcester Housing Authority until February 1, 1977, when he moved from the public housing. His family consisted of himself, his wife, and his wife's three minor children by prior marriages. Plaintiff Louise LaRose, living at 246 Constitution Avenue, Worcester, with her two minor children in a federally funded public housing project owned and operated by the Worcester Housing Authority, became a named plaintiff also. The situation of these two plaintiffs apparently is typical of families in public housing in Massachusetts receiving Socal Security benefits on behalf of members under the age of 18. There is perhaps a maximum of 1,000 such families in Massachusetts [defendant Patricia Harris' answer to plaintiffs' supplemental interrogatories, Answer 1b]. The effect of the practice of the Department of Housing and Urban Development of including Social Security benefits for a child under 18 years of age in the total family income determining the rent of that family in low income public housing projects was felt by the Garvey family in late 1976. The family had been paying rent of $121 for their apartment. The natural father of two of Mr. Garvey's stepchildren passed away, at which time these two children

began receiving Social Security benefits in the amount of $170 per month, each. The Housing Authority included the $340 in the family income for purposes of calculating the rent. Mr. Garvey refused to pay the increase and subsequently the family moved out of public housing.

Louise LaRose lived with her two minor children, and her youngest child, Joseph, received Social Security benefits in the amount of $141.60 after his father became disabled. In June of 1977, in completing the yearly income recertification forms required by the Worcester Housing Authority, the plaintiff Louise LaRose reported the receipt of those benefits. Her adjusted total family income was declared to be increased by the amount of the benefits by the Worcester Housing Authority. Accordingly, on June 17, 1977, the Authority sent her a notice of rent increase, raising her rent from $54 to $75, effective August 1, 1977. There is no question that the reason for the increase in rent was the inclusion of Joseph's Social Security benefits in the adjusted total family income. When Joseph's Social Security benefits were increased, the Authority notified the plaintiff that her rent would be increased to $79 a month on August 1, 1978. An eviction proceeding was begun by the Authority, but in December of 1977 the action was dismissed without prejudice based upon the pendency of this action.

The Statute and the Regulations

The statutory definition of income for the purpose of establishing maximum rentals in public housing projects (set at one-fourth of tenant income) was added to the U.S. Housing Act of 1937 by the Housing and Urban Development Act of 1970. It read, as set forth in 42 U.S.C. § 1402(1), as follows:

> In defining income for purposes of applying the one-fourth of family income limitation set forth above, the Secretary shall consider income from all sources of each member of the family residing in the household who is at least 18 years of age; except that (A) non-recurring income, as determined by the Secretary, and the income of full-time students shall be excluded; (B) an amount equal to the sum of (i) $300 for each dependent, (ii) $300 for each secondary wage earner, (iii) 5 percentum of the family's gross income (10 percentum in the case of elderly families), and (iv) those medical expenses of the family properly considered extraordinary shall be deducted; and (C) the Secretary may allow further deductions in recognition of unusual circumstances.

See Conference Report No. 91-1784, 91st Cong., 2d Sess., reprinted in [1970] U.S. Code, Congressional and Administrative News, 5676-77.

In 1974, the foregoing act was revised by the Housing and Community Development Act. The definition of income was reworded. It added an exclusion for payments by an agency for the care of foster children. The revised language appears in Title 42, U.S. Code § 1437a, as follows:

> . . . In defining the income of any family for the purpose of this Act, the Secretary shall consider income from all sources of each member of the family residing in the household, except that there shall be excluded—
>
> (A) the income of any family member (other than the head of the household or his spouse) who is under eighteen years of age or is a full-time student; . . .

This is the section, the interpretation of which, determines this action.

No discussion of this revision in the legislative history of the Act has been found by the parties. As the defendant Secretary has argued, a comparison of the language of the 1974 statutes reveals that income of family members under the age of 18 was not initially included in the definition, and later it was specifically excluded. In neither instance did the statute define the phrase "income of any family member who is under 18 years of age." At first blush, it would appear that Social Security benefits to a child, whether made in the name of the child or in the name of a guardian, constitute income, and were thus excludable from the total family income basis of public housing rents. The problem, however, is not resolved so simply.

Are Social Security children's benefits income to the child which should be excluded? The Secretary would include the monies issued for the benefit of the child in total family income because the funds are intended for the support of the child. There is no question that (1) Congress could have stated specifically that children's Social Security benefits constituted income, or (2) Congress could have given the Secretary the right to decide in reasonable discretion which type of income would be excluded or included. The Secretary was granted such discretion with regard to non-recurring income. Title 42, U.S. Code § 1437a (1)(B). Plaintiffs contend that, since Congress gave the Secretary discretion concerning non-recurring income, the failure to include a similar requirement with respect to income of children under the age of 18 should not be deemed to have been inadvertent. Plaintiff cites 2 J. Sutherland, Statutory Construction Sec. 4915 (3 Ed. 1943). The Secretary promulgated a regulation to implement the amendment by the Housing and Urban Development Act of 1970. 24 C.F.R. 860.403(o)(ix). A footnote to the definition of total family income, in

circular H.M. 7465.10, issued in March 1971, and re-issued in April of 1972, reads: "Payments to the head of the family for support of a minor are *not* considered to be minor's income and are to be *included* in total family income." [Emphasis in the original.]

On September 26, 1975, the Department of Housing and Urban Development published regulations at 40 F.R. 44323, implementing the addition of a definiiton of income to § 3(1) of the U.S. Housing Act of 1937, as amended by the Housing and Community Development Act of 1974. Part 860, Sub-part D was added to Title 24 C.F.R., defining terms. The regulation as it now reads include in income: "(ix) Payments to the head of the household for support of a minor or payments nominally to a minor for his support, but controlled for his benefit by the head of the household or a resident family member other than the head who is responsible for his support."

The intention of the provision is obvious. One is supposed to include in total family income, payments made for a minor's support subject to the control of an adult family member. This, of course, would include Social Security benefits paid to the children of a deceased insured individual, or to the children of a totally disabled individual.

The parties agreed that it was the established practice of federally subsidized housing authorities and the Department of Housing and Urban Development to include government benefits in total family income for rent determination purposes. It is not disputed that the inclusion of children's Social Security benefits in total family income for rent determination purposes in federally subsidized housing, is consistent with HUD regulations. Plaintiff does contest its alleged consistency with relevant Socal Security regulations (20 C.F.R. § 402, 404.1601-1610).

The defendants draw a policy distinction between income earned by minors and benefits received under the Social Security program. The reason for the distinction, they contend, is social desirability and fundamental fairness. Prior to the receipt of these funds, the minors were maintained by a head of household, and that maintenance included the furnishing of a place to live, as well as other support. They say, therefore, that since shelter is a basic element of maintenance, and since the payments in question are to be applied for the maintenance of a minor, it is equitable that funds intended for maintenance and shelter be factored into the total family income for the purposes of computing rent and public housing. The defendants call the attention of the court to Social Security Administration regulations which define the eligibility of a child for benefits and describe documentation of the eligibility of an adult to whom the payments are made (a representative payee), and urge that these regulations indicate that the benefits are intended primarily for the support of the minor. The defendants point particularly to 20 C.F.R. 404.1604, a Social Security Administration regulation which provides: "Payments certified to a relative or other person on behalf of the beneficiary shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance—i.e., to replace current income lost because of the disability, retirement, or death of the insured individual." They advance the argument that, since the "current income" which has been replaced by the benefit would have been includable in calculating family income, the benefit itself should be so includable.

They point also to 24 C.F.R. § 404.1602, which requires that the representative payee be responsible for the care of the beneficiary.

It may be assumed that the children's Social Security benefits are intended primarily for the support of the children themselves. The plaintiffs counter that Social Security benefits are not support payments. They urge the view upon the court that the benefits are not based upon need. They are paid regardless of the financial situation of the child, and where a child's needs are met by other sources, Social Security benefits must be conserved for the future benefits of the child. While there is some merit to this contention, the court accepts the proposition that the benefits are intended primarily for the support and maintenance of the child and can, therefore, be subject to different treatment. Social Security children's benefits are support payments. More troublesome is the apparent inconsistency between the treatment of Social Security benefits paid to full-time students and those paid to minors, since benefits received by full-time students are not includable in total family income. One can, however, rationalize this distinction also, and the outcome of this dispute should not be decided on the basis of that particular plaintiff's argument. I conclude that the HUD regulatory formula is consistent and compatible with the purposes set forth in the Social Security regulations. It is of interest to note, 20 C.F.R. 404.1606, that when a beneficiary of Social Security payments is confined in an institution, the representative payee is required to give priority to expenditure of payments for current maintenance needs, including customary charges made by the institution. Plaintiffs counter with the contention that there are decided cases holding that children's Social Security benefits may not be used to decrease a family's public assistance grants. In these cases, however, including *Howard* v. *Madigan,* 363 F. Supp. 351 (D. S.D. 1973), and *Johnson* v. *Harder,* 383 F. Supp. 174 (D. Conn. 1974), the courts invalidate state regulatory conduct which penalizes families receiving benefits under federal pro-

grams. We are dealing here not with state conduct, nor with any penalty. The regulation in question in this case is not an unreasonable one. It is based on policy grounds which are consistent with the purpose of the Social Security benefit program. This lends presumptive validity to the regulation. We are still left with the question, however, as to whether the apparent clarity of the language of 42 U.S.C. § 1437a(1) (A) allows the seemingly conflicting interpretation of the Department of Housing and Urban Development. The Court does not agree with the plaintiff that the language of the regulation and the language of the statute are absolutely irreconcilable.

One may lean in either direction with respect to the reasonableness of the regulation of the Department of Housing and Urban Development. As recited hereinbefore, it appears to be based upon grounds which are consistent with the purpose and intent of the Social Security benefit program.

There are two other reasons why this court concludes that summary judgment should issue in favor of the defendants in the case. First, federal courts, in construing statutes, attach great significance to an interpretation made by an administrative agency promulgating a regulation under the statute.

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

Udall v. *Tallman,* 380 U.S. 1, 16 (1975). The interpretation adopted by the Department of Housing and Urban Development was followed in practice since early in 1971. The statute in question was amended (Section 3(1) of the U.S. Housing Act, 42 U.S.C. § 1437(a)) in 1974. The agency interpretation had been embodied through that

period of time in 24 C.F.R. 860.403(o)(ix). Congress did not, in 1974, repudiate the statutory interpretation adopted by HUD. This court, then, must assume Congressional acceptance of the regulation. These two factors, then, the interpretation by the agency or department, and silence on the part of the legislature when amending the statute in question, require that the court assume the propriety of the interpretation given to the statute by the Secretary and enforced by the defendant Worcester Housing Authority.

These considerations outweigh the inclination to assume that when Congress used the word "income", it referred to all monies which might become the property of a child under 18 years of age.

Plaintiffs offer another argument which is worthy of consideration. A provision of the National Housing Act (which is not at issue here) limits rents to 25% of total adjusted family income. Mathematically, it is possible, dependent upon the size of the Social Security benefits received by children in a family, for the percentage of the public housing rent attributable to their receipt of Social Security benefits to exceed what one would normally consider to be their pro rata share of the rent. Plaintiffs contend that, in certain cases therefore, the regulation requires these children to subsidize the rent of other family members and that this result violates the Social Security Act. The defendants respond that it is equitable that funds which are intended for the shelter of a minor be factored into family income for purposes of computing rent. They answer, with common sense, that the regulation does not require the benefits to be used for the support of other family members. They contend further that a minor's right or entitlement to benefits does not exist in the abstract, but relates to the

intended purpose of the benefits and the obligation of a representative payee to use the benefits of a child's maintenance and support. The formula, then, and the court agrees with this conclusion, is consistent and compatible with the purpose of benefits as set forth in the Social Security regulations. For the foregoing reasons, the court concludes that the defendants are entitled to summary judgment.

JOHN J. MCNAUGHT

UNITED STATES DISTRICT JUDGE